

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

75-7244

ORIGINAL

To be argued by
MORRIS WEISSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
C. D. R. ENTERPRISES LTD., :

Plaintiff-Appellant, :

-against- :

HARRISON J. GOLDIN, individually, :
and as Comptroller of the City of :
New York, :

Defendant-Appellee. :
-----X

Docket No.

75-7244

APPELLANT'S REPLY BRIEF
-----X

MORRIS WEISSBERG
Attorney for Appellant
15 Park Row
New York, New York 10038
(212) 964-0492

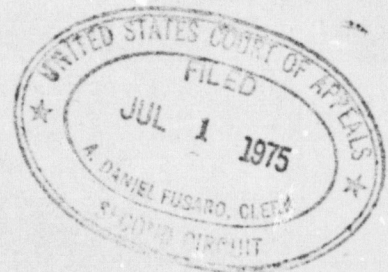


TABLE OF CASES

PAGE

ALEXANDER, MATTER OF, 306 N.Y. 421	9
BELL v. BURSON, 402 U.S. 535 (1970)	10
FUENTES v. SHEVIN, 407 U.S. 67 (1972)	3
MANILA INVESTMENT CO. v. TRAMMELL, 239 U.S. 31	2
MCGORMICK v. OKLAHOMA CITY, 236 U.S. 657	2
MITCHELL v. W. T. GRANT CO., 416 U.S. 600 (1973)	4, 6
NORTH GEORGIA FINISHING, INC., v. DI-CHEM, INC., 95 S. Ct., 719 (1945)	6, 7, 8
ROTH v. BOARD OF REGENTS, 408 U.S. 564 (1972)	3
SHAWNEE SEWERAGE AND TRASNAGE CO. v. STEARNS, 220 U.S. 462	2
SUGAR v. CURTIS CIRCULATION CO. 385 F.Supp. 643 (D.N.Y.1974)	3
WRIGHT v. MALLOY, 373 F. Supp. 1011 (D., vt., 1974)	10

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
C. D. R. ENTERPRISES LTD., :
Plaintiff-Appellant, :
-against- :
HARRISON J. GOLDIN, individually, and :
as Comptroller of the City of New :
York, :
Defendant-Appellee. :
-----X

APPELLANT'S REPLY BRIEF

I.

The defendant-appellee's brief did not state any reason why a public work contractor's bond to replace money withheld pursuant to defendant's pre-judgment seizure thereof, under Section 220-(b)(2) of the New York Labor Law, would not satisfy every public interest in providing a fund from which there would be paid any wages determined to be due to workers employed upon public contract work.

Defendant's first argument is (p. 16):

"that the defendant who believes that a contractual, as well as statutory, duty was breached by the plaintiff is not required by the 14th Amendment to continue to make payments on that contract. *** If it should develop that the plaintiff has paid the prevailing wage to its employees, then the Board of Education may have breached the contract in failing to pay plaintiff what was its due. However, a breach of contract by a municipality is no more a taking

of property without due process than a breach of contract by any other person."

But in this case, the defendant is not withholding money pursuant to contract, but pursuant to Section 220-b(2) of the New York Labor Law, which provides an administrative procedure for hearing and determination of allegations that the contractor failed to pay prevailing wages to its workers; and the statute does not allow the contractor to sue the governmental agency for breach of contract for non-payment of progress payments for work done under the contract, but limits him to judicial review of the administrative determination under Article 78 of the New York Civil Practice Law and Rules; and the contractor cannot sue for such limited judicial review until after the administrative proceeding has been completed and an administrative determination has been made.

Therefore, the cases cited in defendant's brief, p. 16 (Shawnee Sewerage and Drainage Co. v. Stearns, 220 U.S. 462; McCormick v. Oklahoma City, 236 U.S. 657; Manila Investment Co. v. Trammell, 239 U.S. 31), do not apply to this case, because in those cases no statute like Section 220-b(2) of the New York Labor Law barred the contractor from suing the governmental agency immediately for breach of contract for non-payment of progress payments for work done under a public work contract; and no statute limited the contractor to judicial review of an administrative determination after it

was made.

In our main brief (pp. 11-12), we cited and quoted from Fuentes v. Shevin, 407 U.S. 67, 87 (1972), that the constitutionality of pre-judgment seizure of property without a procedural due process hearing cannot be sustained on the ground that the owner's contractual right to continued possession of such property is subject to contractual provisions for re-possession thereof for non-payment of installments of the purchase price, or for other breaches of the sales contract.

A contractual right to work progress payments is constitutionally protected property. Roth v. Board of Regents, 408 U.S. 564 (1972).

II.

Defendant argues (p. 17) that his pre-judgment seizure of \$14,809.09 payable to plaintiff as progress payments for its contract work is constitutional, because he conducted "a lengthy investigation of the complaints of plaintiff's employees that they were not receiving the prevailing rate of wages."

In Sugar v. Curtis Circulation Co., 385 F. Supp. 643, 647 (S.D.N.Y. 1974), certiorari granted, a three-judge court said:

"Mitchell found several procedural assurances which critically distinguished the Louisiana statute from the Florida and Pennsylvania provisions in Fuentes: (1) judicial approval of the sequestration order was required; (2) the grounds for sequestration had to be clearly demonstrated in the affidavit supporting the writ; (3) the attaching creditor was obliged to post a bond; (4) the buyer (debtor) had the right to regain possession of his property by posting a bond and finally, (5) the statute 'entitled the debtor immediately [after sequestration] to seek dissolution of the writ, which must be ordered unless the creditor proves the grounds upon which the writ issued,' Art. 3506, the existence of the debt, lien and delinquency, failing which the court may order return of the property and assess damages in favor of the debtor, including attorney's fees' ***."

See, also, an article in the New York Law Journal, June 26, 1975, p. 1, on "Constitutionality of State's Lien Law".

None of the five grounds required in the Mitchell case is present in the pre-judgment seizure of money payable to a public work contractor under Section 220-b(2) of the New York Labor Law.

Defendant's alleged "lengthy investigation" is not the "judicial approval" which was required in the Mitchell case. Moreover, the evidence at the subsequent administrative hearing showed that the defendant had conducted no investigation whatever, but had accepted the complaints made to him by two individuals, one of whom never even worked for this plaintiff, and the other only worked a very short time on non-governmental work, and not on the governmental contract work on which he claimed to have worked; and he gave the defend-

ant a written statement that he had worked for K.M.A. Construction Corp., and not for the plaintiff herein.

Defendant did not require such two individuals to support their claims against the plaintiff with any evidentiary material. Instead, defendant's claim examiner testified at the administrative hearing that such individuals relied solely on their memory as to the dates and places where they claimed that they had worked.

Although checks in payment of wages were issued to them by a different corporation named K.M.A. Construction Corp. -- which was named as a respondent along with this plaintiff in defendant's notice of hearing (20-23) -- the defendant nevertheless made a pre-judgment seizure of \$14,809.09 of money due to this plaintiff as progress payments for its contract work.

The two individuals who complained to defendant -- Pedro Perez and Daniel Vasquez (21; 23) -- were not required to post a bond to secure the plaintiff against losses it may sustain by defendant's pre-judgment seizure. Plaintiff has lost interest on that money since November 7, 1974, when such pre-judgment seizure was made.

Section 220-b(2) of the New York Labor Law did not permit the plaintiff "to regain possession of the property by posting bond", which was the fourth element sustaining the

constitutionality of the pre-judgment seizure in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1973).

Finally, Section 220-b(2) of the New York Labor Law did not permit the plaintiff

"to seek dissolution of the writ unless the creditor 'proves the grounds upon which the writ issued' (416 U.S. 606, 616-618)".

III.

Defendant argues (p. 20) that unlike Fuentes v. Shevin, 407 U.S. 67 (1972), the defendant herein, as a neutral public official, investigated the claims of two individuals that plaintiff did not pay them the full prevailing rate of wages for their work; and that such investigation by the defendant distinguishes this case from the Fuentes case.

But in North Georgia Finishing, Inc. v. Di-Chem, Inc., ___ U.S. ___, 95 S. Ct. 719 (1975), the creditor filed in a Georgia court a complaint alleging non-payment of \$51,279.17 for goods sold and delivered, with an affidavit and bond for garnishment of the debtor's money on deposit in a bank. The affidavit asserted the debt and "reason to apprehend the loss of said sum or part thereof unless process of Garnishment issues". The clerk of the Georgia court thereupon issued a garnishment summons to the bank. The Supreme Court of the United States decided that submission of the complaint and garnishment affidavit with a bond to the clerk of

the court did not satisfy due process requirements. The Court said (95 S. Ct. at 722):

"Here, a bank account, surely a form of property, was impounded, and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer."
(Emphasis supplied)

The Court emphasized that only a judicial officer can constitutionally authorize a pre-judgment seizure of property (with certain exceptions not here applicable); and that such judicial authorization of pre-judgment seizure of property should be based upon a showing of "facts entitling the creditor to sequestration". Thus, the Court said (95 S. Ct. at 722):

"Nor is the statute saved by the more recent decision in Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed., 2d 406 (1974). That case upheld the Louisiana sequestration statute which permitted the seller-creditor holding a vendor's lien to secure a writ of sequestration and, having filed a bond, to cause the sheriff to take possession of the property at issue. The writ, however, was issuable only by a judge upon the filing of an affidavit going beyond mere conclusory allegations and clearly setting out the facts entitling the creditor to sequestration."
(Emphasis supplied)

In the instant case, the record contains only a brief conclusory statement to the defendant by two individuals that they were not paid the prevailing rate of wages. Thus,

the affidavit of Benedict Santeramo, submitted by defendant, stated (37):

"On July 22, 1974, several employees of the plaintiff C.D.R. Enterprises Ltd. (hereinafter 'CDR') came to the Office of the Comptroller and made statements which indicated that they had been employed by CDR to do painting work at P.S. 100 and P.S. 110 in Brooklyn and that this work was done by CDR pursuant to Contract Nos. 706084 and 706405 between CDR and The Board of Education of the City of New York. Their statements further indicated that they had not been paid the 'prevailing rate of wages' as required by New York Labor Law section 220 and Article 63 of the respective contracts ***."

In addition to being a bare conclusory statement "that they had not been paid the prevailing rate of wages", the affidavit of Mr. Santeramo did not explain why three others in addition to this plaintiff -- Iannelli Construction Company; K.M.A. Construction Corp.; and John Durandes -- were made respondents in the administrative hearing if the defendant received statements from individuals that this plaintiff employed them.

IV.

The decision in North Georgia Finishing, Inc., supra, also stated (95 S. Ct. at 722):

"The Louisiana law also expressly entitled the debtor to an immediate hearing after seizure and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued."

We noted previously that Section 220-b(2) does not provide that a contractor may apply to a New York court for dissolution of the pre-judgment seizure for lack of proof of the grounds upon which it was made.

While Section 220-b(2) of the New York Labor Law provides that "Such investigation and hearing shall be expeditiously conducted", in this case the pre-judgment seizure was made on November 7, 1974, an additional seizure on January 3, 1975, and the administrative hearing is still continuing. It will take a long time before an administrative determination is made, after which more time may elapse if judicial review of such administrative determination is applied for by any party aggrieved by such administrative determination.

There is no merit to defendant's suggestion that plaintiff's failure to give the defendant possession of plaintiff's records pursuant to subpoena duces tecum, or photocopies thereof, delayed the administrative hearing.

For the reasons discussed in our main brief, pp. 15-16, we submit that the defendant had no legal right to stop the hearings to force the plaintiff to give the defendant possession of plaintiff's records, or photocopies thereof.

Matter of Alexander, 306 N.Y. 421 -- cited by defendant -- did not decide that service of a governmental subpoena

duces tecum gave the official issuing such a subpoena the right to take possession of the subpoenaed documents, or to photocopies thereof. Instead, it decided only that such subpoena required production at an administrative hearing of the documents listed in the subpoena.

V.

Defendant's brief did not discuss Point II of our main brief in which we cited Bell v. Burson, 402 U.S. 535 (1970), and Wright v. Malloy, 373 F. Supp. 1011 (D.C. Vt. 1974), to support our argument that the plaintiff had a constitutional right to a preliminary evidentiary hearing and determination of the amount of money to be withheld from payments to plaintiff for its public contract work, pending a post-seizure administrative hearing and determination of allegations that plaintiff did not pay prevailing wages to its workers.

VI.

We agree with the defendant's statement (p. 15 footnote):

"if a three-judge court is appropriate in this case, this court is powerless to grant plaintiff the substantive relief he requests."

Therefore, we ask this Court to reverse the judgment dismissing the complaint, and to direct that a three-judge court

be convened to decide the constitutionality of Section
220-b(2) of the New York Labor Law.

June 30, 1975

Respectfully submitted,

MORRIS WEISSBERG
Attorney for Appellant



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

C.D.R. ENTERPRISES LTD.,

Plaintiff-Appellant,

against

HARRISON J. GOLDIN, etc.,

Defendant-Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.

JAMES STEELE

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

310 West 146th Street, N.Y., N.Y.

That on the 1st day of July 1975 at Municipal Building, N.Y., N.Y.

deponent served the annexed Reply Brief

upon

W. Bernard Richland

the Attorney in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 1st

day of July

19 75

James Steele

Print name beneath signature

JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977